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Tentative Rulings

DEPARTMENT 85 LAW AND MOTION RULINGS

Case Number: 19STCP00818 Hearing Date: March 28, 2019 Dept: 85

Frank Ferry v. City of Los Angeles, et al.

19STCP00818

Tentative decision on petition for writ of mandate: granted

Petitioner Frank Ferry ("Ferry") seeks a writ of mandate compelling Respondents City of Los Angeles ("City"), Los Angeles City Clerk Holly L. Wolcott (collectively, "City"), and Los Angeles Registrar-Recorder Dean C. Logan ("Registrar") to remove Real Party-in-Interest Serena Oberstein's ("Oberstein") from the ballot as a candidate for the Los Angeles City Council, District 12 at the June 4, 2019 City election.

The court has read and considered the moving papers, oppositions,[\[1\]](#) and reply, and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioner Ferry commenced this proceeding on March 18, 2019. The verified Petition alleges in pertinent part as follows.

Real Party Oberstein recently declared herself candidate for the June 4, 2019 City Council election with the chosen ballot designation of "Los Angeles Ethics Commissioner." Oberstein is ineligible to seek elective City office due to an express prohibition in the City

Charter which prohibits any commissioner on the City Ethics Commission from running for City elective office for a period of two years following the end of the commissioner's term if the commission has made a decision relative to the office sought. Oberstein is a former City Ethics Commissioner, a position from which she resigned six months ago.

Oberstein participated in and voted on numerous Commission decisions involving the City Council and candidates seeking election to the City Council. Some of the recent decisions in which Oberstein participated will directly benefit her candidacy for City Council. Oberstein has chosen to ignore the City Charter's revolving door provision by seeking elective office.

Ferry seeks a peremptory writ of mandate directing Respondents City and Registrar to remove Oberstein's name from the ballot as a candidate for the City Council for the June 4, 2019 election.

2. Course of Proceedings

On March 18, 2019, Petitioner Ferry applied *ex parte* for an alternative writ or an order shortening time for hearing. The court granted the alternative writ at an *ex parte* hearing on March 20, 2019 and set the trial on the Petition for March 28, 2019.

B. Standard of Review

A party may seek to set aside an agency decision by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. Code of Civil Procedure ("CCP") §1085. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. Traditional mandamus permits judicial review of ministerial duties as well as quasi-legislative and legislative acts. County of Del Norte v. City of Crescent City, (1999) 71 Cal.App.4th 965, 972.

A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. See Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701. No administrative record is required for traditional mandamus to compel performance of a ministerial duty.

C. Governing Law

The City Charter requires that neither a member of the Ethics Commission nor its Executive Director shall seek election to any City office concerning which the commission has made a decision during the term of the commissioner or Executive Director unless the election for that office is to be held at least two years following the expiration of the terms of office of the commissioner or Executive

Director. City Charter §700(d).

Any elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in a candidate's ballot designation. Elections ("Elec.") Code §13314(a)(1). An "elector" is any person who is a United States citizen, is over 18 years old, and is a resident of an election precinct at least 15 days prior to election. Elect. Code §321. A peremptory writ of mandate shall issue on proof (1) that the error, omission, or neglect of duty is in violation of the Elections Code or Constitution and (2) that issuance of the writ will not substantially interfere with the conduct of the election. Elect. Code §13314(a)(2); see Mann v. Superior Court (1986) 181 Cal.App.3d 372.

D. Statement of Facts

1. Petitioner's Evidence[\[2\]](#)

Ethics Commission terms last five years. Los Angeles City Charter §700(b). Oberstein resigned her position six months ago in November 2018. Pet. RJN Ex. B.

Oberstein recently declared herself candidate for the June 4, 2019 City Council election with the ballot designation of Los Angeles Ethics Commissioner. Pet. RJN Ex. C.

During her term as Commissioner, Oberstein participated in numerous Ethics Commission decisions concerning the office she is presently seeking. Pet. RJN Exs. D-G. On October 21, 2018, Oberstein made a motion and then voted to approve an action to increase the amount of matching campaign funds a City Council candidate may receive. Pet. RJN Ex. D. On June 21, 2016, Oberstein voted to impose a fine for Kelly M. Lord ("Lord") for violating City campaign rules relating to Lord's candidacy for the same seat Real Party seeks now. Pet. RJN Ex. E. On December 6, 2016, Oberstein voted to impose a fine for Marie Rumsey for violations of the City Charter's revolving door restrictions. Pet. RJN Ex. G. On December 16, 2014, Oberstein voted to impose a fine for Navraj Singh ("Singh") for violating City campaign rules relating to Singh's candidacy for the same seat Real Party seeks now. Pet. RJN Ex. F.

2. The City's Evidence[\[3\]](#)

In June 1990, the voters approved Measure H, which had been placed on the ballot by the City Council and which amended the City Charter to create an Ethics Commission to oversee and enforce new City ethics, campaign financing, and lobby laws. See City RJN Ex. 4 (voter pamphlet for June 1990 election).

When first introduced to the City Council, the provision contemplated a one-year ban on the executive officer of the Ethics Commission from running for any public office: The executive officer, during his or her term of appointment and for one year after the term has expired, shall not seek election to any other public office." City RJN, Ex. 1. Amendment 28 was proposed that would prohibit any member of the Ethics Commission, in addition to the executive officer, from seeking election to any other public office. City RJN, Ex. 2. Amendment 28 was subsequently amended to Amendment 28a, from seeking election to any City public office for which the Ethics

Commission had made a decision for two years after the commissioner or executive officer's term has expired. City RJN Ex. 3. This is the language submitted to and approved by the voters in Measure H in 1990. City RJN Ex. 4. A new City Charter was approved by voters in 1999 which relocated and re-numbered the ethics provision to section 700, and it was amended in 2007 to add Los Angeles Unified School District elections within the scope of section 700, but otherwise section 700 is in substantively the same form as in 1990. City RJN Exs. 5-7.

To qualify for the special election ballot, candidates must timely file a Declaration of Intention to Become a Candidate and submit a sufficient number of signatures on Nominating Petitions. Puchalski Decl. ¶6. Ferry and Real Party timely filed their Declarations of Intention to Become a Candidate on February 11, 2019. Puchalski Decl. ¶¶ 7-8, Response Ex. 8. Ferry submitted his Nominating Petition on February 25, 2019, and it was found sufficient on February 26, 2019. Puchalski Decl. ¶12, Response Ex. 8. Oberstein submitted her Nominating Petition on March 4, 2019, and it was found sufficient on March 11, 2019. Puchalski Decl. ¶12, Response Ex. 8. The City Clerk's Office accepted Oberstein's papers as facially valid. Puchalski Decl. ¶13.

3. Oberstein's Evidence[\[4\]](#)

Measure H had its genesis in the 1989 recommendations of the Commission to Draft an Ethics Code for Los Angeles City Government. RPI RJN Ex. B.

4. Reply Evidence

In the primary election of March 8, 2011, there were six candidates for the District 12 seat on the City Council, including Mitchell Englander, Lord, and Singh. Gough Decl. ¶5, Ex. 4.

Oberstein was appointed to the Ethics Commission by former District 12 Councilmember Mitchell Englander on September 23, 2014. Gough Decl. ¶2, Ex. 1.

On December 16, 2014, Oberstein approved the imposition of a fine on Singh and Singh for City Council 2011 in Case CEC 2012-10. Gough Decl. ¶3, Ex. 2.

On June 21, 2016, Oberstein participated in approving the imposition of a fine on Lord for violations stemming from Lord's campaign for District 12 in the 2011 election. Gough Decl. ¶3, Ex. 3.

The imposition of fines by the Ethics Commission on Singh and Lord drew criticism from City Watch Los Angeles. Gough Decl. ¶6, Ex. 5.

The City of Sacramento's Ethics Commission Rules prevent a member of the commission from holding "any elective office" for four years after the commissioner's term ends. Gough Decl. ¶7, Ex. 6.

E. Analysis

Petitioner Ferry alleges that Oberstein's candidacy for City Council violates City Charter[5] section 700(d). He seeks a writ of mandate compelling Respondents to remove Oberstein's name from the ballot as a candidate for the City Council, District 12 in the June 4, 2019 election. Ferry contends that Oberstein must be removed from the ballot because section 700(d) expressly precludes her from eligibility to run for the office.

Section 700(d) provides in pertinent part that a member of the Ethics Commission shall not "seek election to any City office... concerning which the commission has made a decision during the term of the commissioner unless the election for that office is to be held at least two years following the expiration of the term of the office of the commissioner...." (Emphasis added.)

As Oberstein argues, the parties' positions require the court to interpret the term "office" and a "decision [concerning the City office]" as used in section 700(d). Ob. Opp. at 1.

1. City Office

Petitioner Ferry initially interprets the term "City office" to mean, as pertinent, the entire City Council. App. at 5. Ferry shows Oberstein left the Ethics Commission six months ago, and he alleges that the Ethics Commission has rendered decisions benefitting Oberstein's candidacy for the City Council. Pet RJN Exs. B, D, E, G; App. at 5.

The City and Oberstein offer a different interpretation of the meaning of "office" under section 700(d). The City argues that the term's plain meaning refers to a particular City office. As such, a commissioner would not be barred from seeking elected City office if he or she made a decision generally applicable to all City offices. City Opp. at 5. Oberstein contends that the pertinent "office" is the remaining term of the District 12 Councilmember position. RPI Opp. at 5. She notes that the common law meaning of the term "public office" is the right, authority, and duty conferred by law for a given period a person is invested with power to perform a public function. In re M.M., (2012) 54 Cal.4th 530, 541 (citation omitted). Id.

In reply, Ferry appears to narrow his definition of "office" so that it includes a specific office of City Councilperson -- for Oberstein, the District 12 City Councilperson position. Reply at 4.

The principles of statutory construction apply to interpretation of charter provisions. Arntz v. Superior Court, (2010) 187 Cal.App.4th 1082, 1092, n.5; Domar Electric v. City of Los Angeles, (1994) 9 Cal.4th 161, 170-72. The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of the language and seeking to avoid making any language mere surplusage. Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724. Significance, if possible, is attributed to every word, phrase, sentence and part of an act in pursuance of the legislative purpose. Orange County Employees Assn. v. County of Orange, (1991) 234 Cal.App.3d 833, 841. The various parts of a statute must be harmonized by considering each particular clause or section in the context of the statutory framework as a whole. Lungren v. Deukmejian, (1988) 45 Cal.3d 727, 735. The enactment must be given a reasonable and commonsense interpretation consistent with the apparent purpose and intent of the lawmakers, practical rather than technical in nature, and which, when applied, will result in wise policy rather than mischief or absurdity. To that end, the court must consider, in addition to the particular language at issue and its context, the object sought to be accomplished by the statute, the evils to be remedied,

and public policy. Lungren v. Deukmejian, *supra*, 45 Cal. 3d at 735.

The plain meaning of the term “office” in section 700(d) is an elected City office which, as pertinent, is the position of District 12 Councilmember. Ferry and the City are essentially in agreement with this conclusion. While Oberstein contends that the term “office” means not only the position of District 12 Councilmember but also the pertinent term of that office, nothing in the plain meaning supports this position. Her citation to In re M.M. merely supports a conclusion that a public office under the common law requires a term of office. 54 Cal.4th at 541. It does not support a conclusion that the term “office” means a particular term of office.

In state law, the term “office” generally means the position without reference to term. *See, e.g.*, Elect. Code §§ 310, 313 (city or county office means the office filled by city or county officer); Govt. Code §§ 34879, 34880 (general law cities). As Ferry points out (Reply at 4), the City Charter defines “City Offices” as the Office of the Mayor, Office of the City Council, Office of the City Attorney, Office of the Controller, Office of Administrative and Research Services, the Office of the City Clerk, and the Office of Finance. §201. Of these offices, only the Mayor, City Councilmembers, Mayor, and Controller are elected officials. The Mayor, City Attorney, and Controller are elected at large, and the City Councilmembers are elected by District. §202.

The plain meaning of the term “office” in section 700(d) refers to the position of City Councilmember, but not a particular term of office.[\[6\]](#)

2. Decision Concerning the City Office

Section 700(d) bars an Ethics Commission member from seeking election to any City office concerning which the Ethics Commission has made a decision during the term of the commissioner, unless the election occurs at least two years after the member is out of office. It is undisputed that Oberstein left the Ethics Commission

Oberstein argues that she would not be prohibited from participating in the election unless the Commission had rendered decisions against the current term of the District 12 Council seat.

Ferry contends that Oberstein is ineligible because she participated in Ethics Commission decisions relating to the District 12 Councilmember office. App. at 5, Reply at 4. In part, Ferry cites an Ethics Commission decision to increase the amount of matching campaign funds a City Council candidate may receive. Pet. RJN Ex.D; App. at 5.

Oberstein correctly rebuts this argument. She notes that the Ethics Commission performs various functions, including (a) making “recommendations to the Mayor and the [City] Council concerning campaign finance reform, lobbying, and governmental ethics and conflicts of interest” and reports every three years on these issues (§702(f)), and (b) investigating and adjudicating violations of campaign financing, lobbying, and conflicts of interest and governmental ethics (§706). She argues that the Ethics Commission made only a recommendation to the City Council and Mayor and not a decision with respect to matching campaign funds. RPI Opp. at 5.[\[7\]](#) Oberstein concludes that section 701(d)’s reference to decisions can only mean adjudicatory decisions made by the Ethics Commission concerning a violation of City ethics rules. RPI Opp. at 6.

The court need not decide whether Oberstein is correct that a section 700(d) decision is limited to adjudicatory decisions because, as

Ferry contends, Oberstein participated in adjudicatory decisions concerning the District 12 position while she was a member of the Ethics Commission. Reply at 4-5. Ferry notes that Oberstein was appointed to the Ethics Commission by former District 12 Councilmember Mitchell Englander on September 23, 2014. Gough Decl. ¶2, Ex. 1. On December 16, 2014, Oberstein approved the imposition of a fine on Englander's opponent in the 2011 campaign for the District 12 Councilmember office, Navraj Singh ("Singh"). Pet. RJN Ex.F; Gough Decl. Ex. 2. On February 16, 2016, Oberstein approved a fine on a second candidate in the 2011 District 12 City Councilmember's election, Kelly Lord ("Lord"). Pet. RJN Ex. E, Gough Decl. Ex. 3. These decisions concern the very office for which Oberstein seeks election. She only resigned from the Ethics Commission six months ago and has not met the two-year time requirement of section 700(d). Therefore, she is ineligible to run for the District 12 City Councilperson position.

In an attempt to avoid ineligibility, Oberstein argues that her participation in ethics rulings against Lord and Singh do not qualify under the section 700(d) meaning of "decision [concerning the City office]". RPI Opp. at 6. She argues, without admissible legislative history, that the City Council's purpose in proposing section 700 was to prohibit a commissioner from taking actions against a current officeholder against whom the commissioner intended to run. Ibid. She contends that the office she is seeking is the remaining 2019-20 years of Englander's 2015-20 term, and she made no decisions while a member of the Ethics Commission concerning Englander or his term of office. Nor did the two fined candidates ever hold the District 12 office. Ibid.

Oberstein attempts to crop section 700(d) too narrowly. As stated, the plain meaning of "office" in section 700(d) refers to the position of City Councilmember, and not a particular term of office. In this case, the position is the District 12 City Councilmember. Oberstein clearly has participated in Ethics Commission adjudicatory decisions concerning the District 12 position. Her effort to limit section 700(d) to decisions against the incumbent – Englander – exists nowhere in the plain language of the provision. It also would defeat the voter's purpose in enacting section 700(d) by enabling an Ethics Commissioner to participate in a punitive decision against a candidate for an office, resign, and then run for that office against weakened opponents. The plain meaning of section 700(d) prohibits an Ethics Commission member from running for a City office for two years after resigning where he or she participated in a decision concerning that City office.

As the meaning of section 700(d)'s language about a decision concerning a City office is plain, it is unnecessary to review the legislative history cited by both the City and Oberstein. The video relied on by both also is inadmissible. Even if the video were admissible, Ferry points out that the City Council debate shows a concern that a commissioner might make an ethics decision against an incumbent and then use that decision to run against the official, but also shows a concern that the commissioner use an ethics decision to prevent a non-incumbent from running for the office. Reply at 6. Finally, it is worth noting that the legislative intent at issue is the intent of the voters in passing Measure H. The City Council's debate may be relevant, but it is not determinative of voter intent. Neither the City nor Oberstein point to anything in the Voter Pamphlet for the June 5, 1990 election (City RJN Ex. 4) that supports Oberstein's proposed limitation.^[8]

F. Conclusion

The petition for writ of mandate is granted. Oberstein is ineligible to run for the District 12 Councilmember seat, and the City an

County are directed to take all action necessary to remove her from the ballot. Unless the parties waive a writ and judgment, Ferry's counsel is ordered to prepare both, serve them on opposing counsel for approval as to form, meet and confer if there are objections, and then submit the proposed judgment and a declaration stating the existence/non-existence of any unresolved objections by April 1, 2019 at 9:30 a.m. An OSC re: judgment is set for April 2, 2019 at 1:30 p.m.

[1] The hearing was set with the Registrar's approval on a date that will not interfere with the election, and the Registrar's response states that it will not take a position on the Petition's merits. Reg. Resp. at 2.

[2] Petitioner Ferry requests judicial notice of (1) Real Party's biography as maintained by the City Ethics Commission (Ex. A), (2) the minutes of the City Ethics Commission meeting minutes from its November 2018 meeting (Ex. B), (3) the official listing of candidates for the City Council, District 12 (Ex. C), (4) the minutes of the City Ethics Commission from its meeting of October 21, 2018 (Ex. D), (5) the minutes of the City Ethics Commission from its meeting of June 21, 2016 (Ex. E), (6) a copy of a press release of the City Ethics Commission following its meeting of December 16, 2014 (Ex. F), (7) the minutes of the City Ethics Commission from its meeting of December 6, 2016 (Ex. G), (8) Section 700 of the City Charter (Ex. H). The requests are granted for Exs. B-E, G and H. Evid. Code §§ 452(b), (c). The press release and biography are not subject to judicial notice, which is denied for Exhibits A and F.

[3] The City requests judicial notice of the following exhibits: (1) the text of proposed ethics law for the City of Los Angeles Ethics Act (Ex. 1; Holland Decl. ¶5); (2) Motion 28, presented by Nate Holden, Councilman, 10th District (Ex. 2; Holland Decl. ¶6); (3) a video of City Council meeting, January 18, 1990 (see Holland Decl. ¶7); (4) Motion 28a, adopted as amended on January 18, 1990 (Ex. 3; Holland Decl. ¶8); (5) City of Los Angeles Voter Information pamphlet from the Special Municipal Election on June 5, 1990 (Ex. 4; Holland Decl. ¶¶ 9-10); (6) provisions of the City Charter regarding the City Ethics Commission as adopted in 1999 (Ex. 5; Holland Decl. ¶11); (7) City of Los Angeles Official Sample Ballot and Voter Information pamphlet from the primary nominating and consolidated elections on March 6, 2007 (Ex. 6; Holland Decl. ¶12); (8) provisions of the current City Charter pertaining to the City Ethics Commission (Ex. 7; Holland Decl. ¶13).

The proposed text, motions, voter pamphlets, and adopted amendments (Exs. 1-2, 4, 6-7) are part of the legislative history of Charter section 700(d) or official acts of a public agency and are subject to judicial notice. Evid. Code §452(b); People v. Superior Court, (1991) 233 Cal.App.3d 477, 487, n.5. The request is granted for those exhibits. The video (Ex. 3) may be part of the legislative history of Charter section 700(d) as floor statements, but it is not subject to judicial notice because it has not been properly authenticated. See Holland Decl. ¶7. The request is denied for Exhibit 3.

[4] Oberstein requests judicial notice of (1) letter from the Governmental Ethics Ad Hoc Committee transmitting a report to the City Council proposing new ethics laws (Ex. A), (2) Online Summary of Council File: 89-1670 (Ex. B), (3) 2018 Los Angeles Ethics Commission report to the City Council regarding recommended amendments to the campaign finance ordinance (Ex. C), (4) a December 11, 2018 Report from Rules, Elections, and Intergovernmental Relations Committee (Ex. D).

The letter proposing a change to the ethics law (Ex. A) and online file (Ex. B) are part of the legislative history for Measure H and are judicially noticed. Evid. Code §452(b). The Ethics Commission proposal and Committee report (Exs. C, D) would be subject to

judicial notice as legislative history of an enacted ordinance, but the court has no evidence that the City Council ever enacted an amendment to the City's matching funds program. The requests are denied. See Evid. Code §452(b).

[5] All further statutory references are to the City Charter unless otherwise stated.

[6] Because there is no ambiguity in the term, there is no need to review the legislative history on this point. The City offers the legislative history of section 700(d) to show that the initial proposal was for a one-year ban only on the executive officer of the Executive Commission from running for any public office (City RJN, Ex. 1), Amendment 28 proposed that Ethics Commission commissioner, in addition to the executive officer, would be barred from seeking election to any other public office (City RJN, Ex. 2), and Amendment 28a amended this proposal to reduce the prohibition to seeking election to any City public office for which the Ethics Commission had made a decision for two years after the commissioner or executive officer's term expired. City RJN Ex. 3. This is the language submitted to and approved by the voters in Measure H in 1990. City RJN Ex. 4. From this legislative history, the City argues that the City Council was concerned that a commissioner might make a decision concerning a particular official and use that decision to run against the official. City Opp. at 6. Even if the City is correct, its conclusion does not affect the plain meaning of "office."

[7] Oberstein's request for judicial notice C and D were denied, but there is no evidence that Oberstein's motion on matching funds as a member of the Ethics Commission was a final City decision.

[8] Oberstein argues that she has a fundamental right to seek public office and any restriction should be narrowly construed. RPI Opp. at 7. This is true, but Ferry provides evidence that broader eligibility restrictions are commonplace and do not violate any fundamental right to run for office. Reply at 7-8, Ex. 6.